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Degrees of Homicide in Kentucky

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DEGREES OF HOMICIDE IN KENTUCKY

It is provided in Sec. 262 of the Kentucky Criminal Code that:—

"Upon an indictment for an offense consisting of different degrees, the defendant may be found guilty of any degree not higher than that charged in the indictment, and may be found guilty of any offense included in that charged in the indictment."

And in Sec. 263, that:—

"The offenses named in each of the subdivisions of this section shall be deemed degrees of the same offense, in the meaning of the last section.

1. All offenses of homicide * * * * *"

Sec. 1151 of the Carroll Statutes, 1909, provides:—

"Any person who shall wilfully strike, stab, thrust or shoot another, not designing thereby to produce or cause his death, and which is not done in self-defense or in the attempt to keep and preserve the peace, or in the lawful arrest or attempt to arrest a person charged with felony or misdemeanor, or in doing any other legal act so that the person struck, stabbed, thrust or shot shall die thereof within six months next thereafter shall be confined in the penitentiary not less than one nor more than six years. But this section shall not be construed to change the law of malice in respect to any other offense."

In the case of Terrell vs. Commonwealth, 13 Bush, 246, decided in 1877, the lower court instructed the jury that;

"If they shall believe * * * that the accused * * * * in a sudden fray, and in sudden heat and passion, without previous malice, and not in his necessary or apparently necessary self defense, and not in the effort to keep the public peace * * * * did shoot one H. M. * * *, they should find him guilty of involuntary manslaughter, and affix his punishment * * * * not less than one nor more than six years."

The Court of Appeals said: "That the crime denounced in the Statute (Sec. 1151) was inaccurately called involuntary manslaughter in the instruction cannot have prejudiced his (the defendant's) substantial rights, and the giving of the instruction furnishes no ground for reversing the judgment."

In Connor vs. Commonwealth, 76 Kentucky 714, decided early in 1878, upon an indictment for murder by striking with a "club, a bludgeon, a croquet mallet, a deadly weapon," the trial court instructed the jury;—

"If the jury believe * * * * * * the defendant struck said C wilfully, that is intentionally, when such striking was not done in his necessary or apparently necessary self defense, nor in an attempt to keep or preserve the peace * * * , then although they may not believe that defendant designed to produce or cause said C's death, the should find him guilty of killing by "wilfully striking."

The jury returned the verdict "We, the jury, find the defendant guilty by wilfully striking, and fix his punishment at confinement in the penitentiary for one year."

The Court of Appeals said with reference to Sec. 1151:

"No punishment is prescribed by that statute for involuntary manslaughter unless Sec. 2, Art. 4, quoted supra can be construed as defining that crime."

"We are also to look to the Common Law definition of involuntary manslaughter, and by comparing that definition with the statute (Sec. 1151) to decide whether the offense described in the statute is the same as the Common Law offense of involuntary manslaughter. * * * * * * * *.

We are therefore of the opinion that Sec. 2, Art. 4 (Sec. 1151 of Carroll's Statutes, was intended to create a new offense and not to provide for the punishment of the Common Law offense." This was a reversal of Terrell vs. the Commonwealth, although it is only fair to the court to say that this question was either not presented to it in that case or it was not carefully considered.

In Buckner vs. Commonwealth 14 Bush 601, decided in March 1879, where there was a verdict of manslaughter upon an indictment for murder, the Court of Appeals approved the refusal of the trial court to instruct to the effect that if the jury found from the facts that defendant was guilty of wilfully striking under the statute, they must acquit. The Court of Appeals used this language: "He may be guilty of involuntary manslaughter without being guilty of the statutory offense, but, if guilty of the statutory offense, he is also guilty of involuntary manslaughter, for the former includes every element of the latter, and as he may be convicted of that offense under an indictment for murder, or for voluntary manslaughter, the court, where the facts justify it (as in this instance) should, under an indictment for murder or voluntary manslaughter instruct the jury in the law of involuntary manslaughter."

In Trimble vs. Commonwealth, 78 Kentucky, 176, decided in November, 1879, only a few months after Buckner vs. Commonwealth, the Court of Appeals said: "In Connor vs. Commonwealth we have said: 'Involuntary manslaughter is the killing of another in doing some unlawful act, but without any intention to kill, and this may be either when the act is directed against the person killed, or when it is directed against another person or thing and kills one not intended to be hurt. * * * * Wharton on Homicide, page 35, says: 'It is involuntary manslaughter when a man doing an unlawful act, not amounting to felony, by accident, kills another. It differs from homicide excusable by misadventure in this: that misadventure always happens in the prosecution of a lawful act, but this species of manslaughter in the prosecution of an unlawful one. When a person does an act lawful in itself, but in an unlawful manner, this excepts the killing from homicide excusable per infortuniam and makes it involuntary manslaughter."

And the court continues: "On an indictment for murder or manslaughter, where the facts justify it an instruction as to the law of involuntary manslaughter is proper and even necessary, but an instruction as to the statutary offense defined in Sec. 2, Art. 4, Ch. 29, of the General Statutes (Sec.1151 of Carroll's Statutes) is not, under such indictment, proper."

Blackstone, Book 4, page 192, approved in Trimble vs. Commonwealth and Wharton on Homicide quoted, says: "Involuntary manslaughter differs also from homicide excusable by misadventure in this, that misadventure aways happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As, if two persons playing at sword and buckler, unless by the King's command, and one of them kills the other, this is manslaughter, because the original act was unlawful, but is not murder, for the one had no intent to do the other any personal mischief. So, when a person does an act lawful in itself, but in an unlawful manner, and without any caution and circumspection, as when a workman flings down a stone or piece of timber into the street and kills a man, this may be either misadventure, manslaughter or murder, according to the circumstances under which the original act was done; if it were in a country village where few passengers are, and he calls out to all people to have a care, it is a misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning, and murder if he knows of their passing and gives no warning at all, for then it is malice against all mankind. And in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in its consequences naturally tending to bloodshed, it will be murder, but if no more was intended than a mere civil trespass, it will only amount to manslaughter."

In Peoples vs. Commonwealth, 87 Ky., 487, decided in 1888, indictment for murder by causing an abortion, and conviction of manslaughter: Defendant demurred to the indictment and contended that the Statute (Sec. 1151) repealed the common law in a case like this, and that the offense set forth is not murder. Upon the first hearing in the Court of Appeals, the Court said: "Nor is this properly a case of involuntary homicide. The act was not only immoral, violate of the law of nature and deliberate in character, but reckless of life and wrongful per se. The death of the woman may not have been intended; there may have been no express malice against her * * * *.

If this were but an involuntary homicide, then at common law and in this state, the punishment could be but a fine and jail imprisonment, or one entirely inadequate to deter evil disposed persons from its commission. The recklessness of the act forbids it being so regarded. Offenses and punishments must be so graded as to remedy the mischief. It has, however, never been held to be less than voluntary manslaughter. It is perhaps questionable whether even in mercy, or out of regard to the frailty of human nature, it should under any circumstances be so reduced as to one whose act is deliberately done, and known to the doer to be reckless of life and the interests of good society.

By at least the earlier common law it appears to have been nothing less than murder, although there may have been no intention to kill the woman.

* * * * for, though the death of the woman was not intended, the acts were of a nature deliberate and malicious, and necessarily attended with great danger to the persons on whom they were practiced. * * * *

This statute (Sec. 1151) applies to cases where the injury is done without the consent of the injured party and with an intent upon the part of the doer to do it. This is manifested from the fact that the doer is not liable to punishment under it 'if the act be done in self-defense, on in an attempt to keep and preserve the peace or in the lawful arrest or attempt to arrest a person charged with felony or misdemeanor, or in doing any other legal act.'

In a case like that of the accused the party is liable, although the death of the victim may not have been intended, and the act done with her consent, because it is in its character wrongful per se, reckless of life, and calculated to destroy it. The statute was not intended to meet such a case, and does not repeal the common law relating to it."

It will be noticed that there has been no indictment for the offense defined in the statute, but that it has been brought before the court only by authority of sections 262 and 263 of the criminal code, in the effort to have an instruction that upon an indictment for murder, the jury might return a verdict of guilty of the offense of the statute. It may be fairly gathered from these decisions that:—

1. The statute has erected a new offense.

2. The offense so defined is comprehended under the common law definition and includes special instances of involuntary manslaughter.

3. Upon an indictment for murder it would be improper to instruct that the jury might bring in a verdict of guilty under the statute.

4. Upon an indictment for murder, the jury, if they found the defendant guilty of the elements set out in the statute, might bring in a verdict of involuntary manslaughter and fix the punishment at one to six years.

The case of Peoples vs. Commonwealth, supra, the drift of which is somewhat towards a different view, is valuable because it contains some pertinent language applicable to the law of homicide and to the state of the legislative mind at the time of the enactment.

1. A killing accomplished by an act "immoral, violative of the law of nature and deliberate in character, (moreover) reckless of life and wrongful per se," is not involuntary manslaughter, although the death may not have been intended and there may have been no express malice against the deceased.

2. "Offenses and punishments must be so graded as to remedy the mischief." And it is questionable whether even in mercy or out of regard to the frailty of human nature an offense which is included in murder, at least voluntary manslaughter, should under any conditions of construction or mitigation be reduced to involuntary manslaughter, "as to one whose act is deliberately done and known to the doer to be reckless of life and the interests of good society."

3. That an act is murder, athough there may have been no intention to kill if the act was "of a nature deliberate and malicious, and necessarily attended with great danger to the person on whom it was produced."

4. One may be liable for the death of another, although death may not have been intended as the result of the act if the act itself was wrongful per se, reckless of life and calculated to destroy it.

5. That as to the offense of criminal abortion the statute does not change the law of malice as interpreted and applied at common law.

6. And (inferentially) the statute may change the law of malice as interpreted and applied at common law in respect to other offenses.

In addition to the cases already mentioned, there have been others in which the facts appear to illustrate the offense erected by the statute, and in which there was conviction for manslaughter. This offense of manslaughter was, however, presumably voluntary manslaughter.

In Sparks vs. Com. 66 Ky., 111, decided in 1867, the facts were that S was walking with a companion by his side on the streets of a country town at Christmas time. These two were in company with two others, one being the deceased, who were walking immediately behind. S said: "Let us have a Christmas gun," drew his pistol, pointed it over his shoulder to the rear, fired, and the shot killed deceased.

The court said that the jury took the "charitable view" that there was no intention to kill, but, nevertheless, convicted of manslaughter.

In York vs. Com., 82 Ky., 360, decided in 1884, the facts were: The accused, deputized to make an arrest in one county, proceeds to another, and there approaches the deceased, and W, who was the person to be arrested, who are surprised in bed and unarmed. Accused entered the room with his rifle loaded and cocked in his hand, pointed at the deceased; the gun goes off and kills the companion. He was convicted of manslaughter. The Court of Appeals said: "It may now be regarded as well settled in this state by numerous decisions of this court that when one does an act in such a reckless, careless manner, that it is calculated to endanger human life, and death ensues, he is guilty of manslaughter, although the death of the person killed may not have been intended."

In Brown vs. Commonwealth, 17 So. W. 220, decided in 1891, the facts were that accused fired his pistol in a crowded ball-room intending to shoot A, but shot B. The court said: If he did this, not with the design of killing anyone, but for his diversion merely, but killed one of the crowd, he is guilty of murder; for such conduct establishes "general malignity and recklessness of the lives and personal safety of others, which proceed from a heart void of just sense of social duty, and fatally bent on mischief," and whenever the fatal act is committed deliberately or without adequate provocation, the jury has a right to presume that it was done with malice.

In Benmengfield vs. Com., 22 So. W., 1020, decided in 1893, the facts were: B, perhaps somewhat under the influence of former ill-feeling, but now, presumably, in anger, struck deceased over the head with a wagon standard, causing death. The syllabus of the case says: "It is not error to charge that, if defendant in sudden heat and passion, struck and killed deceasd with a club, not in his necessary, or apparently necessary, self-defense, the jury should find him guilty of manslaughter."

In Pence vs. Com., 51 So. W., 801, decided in 1899, the facts were: P, being suspicious as to the relations between his wife and S, the deceased, warned S not come to his house, but later found him there, when he struck S on the head with the butt of his pistol, causing death. P contended that he did not intend to kill S, but only to beat him with the design of making him stay away. He contended, also, that Sec. 1151 had changed the common law and that he was guilty neither of murder nor manslaughter unless there was the intent to kill. His conviction of manslaughter was sustained.

In Ross vs. Com., 55 So. W. 4, decided in 1900, the accused killed deceased by cutting about his head with a pen-knife. The court quotes Rob. Cr. Law, Sec. 198, that the killing of another person in doing some unlawful act not amounting to a felony, nor likely to endanger life, but without an intention to kill, is involuntary manslaughter, and the court said: "Although there was no intention to kill, yet his act was likely to endanger life, and the instruction as to involuntary manslaughter was properly refused."

In Montgomery vs. Commonwealth, 63 So. W., 747, decided in 1901, a father was convicted of the murder of his own child by immoderate chastisement. The court quotes Bishop that a parent who goes beyond moderate chastisement is indictable for assault and battery; or if the child die, for felonious homicide; if the instrument is a deadly weapon, it will be murder; if an instrument improper but not deadly be used, or a proper instrument to an improper degree, the offense is manslaughter.

In contrast with the above cases but not in conflict with them, yet throwing some light upon the application of Sec. 1151, is the case of Donnellan vs. Commonwealth, 70 Kentucky 676, decided in 1870, in which the court said: "The instruction to the effect that in any case, the use of a deadly weapon, not in necessary self-defense, whereby death ensues, will constitute murder, was also erroneous. Such use of a deadly weapon is evidence of malice, and may be an essential ingredient in the proof of murder in many cases, but it does not follow that every homicide committed by the use of a deadly weapon, and not in necessary self-defense is murder."

It has been suggested by students of the Law Department of Kentucky State University in class-room, that there are three other possible situations which might be considered in this connection, as occasions for the application of Sec. 1151:—Where a foot-ball player slugs his opponent for the purpose of incapacitating him; where one of the combatants is killed in a prize-fight; and where the knife juggler throws wild and injures the woman whom it is his purpose to miss and not to hit.

From the foregoing decisions, and many others, especially Spriggs vs. Commonwealth, 68 So. W. 1087, where many authorities are cited, the following propositions may fairly be predicated as applicable to the law of homicide in Kentucky:—

1. That felonious homicide may be distributed into those cases (1) where the intent to kill is a formed design in the mind of the accused and is the motive of the act (2) where the intent to kill is not specifically formed but is to be imputed from the circumstances, and is not the motive of the act.

2. That the use of an instrument deadly in nature and calculated to endanger life is a circumstance from which the jury may impute the intent to kill.

3. That any act which discloses a reckless disregard of the lives and personal safety of others is a circumstance from which the jury may impute the intent to kill.

4. That the intent to kill in the abstract, that is, general intent, is a circumstance from which the jury may impute the intent to kill the deceased.

5. That the prosecution of a felonious purpose is a circumstance from which the jury may impute the intent to kill.

This statute—Sec. 1151—has not only been a source of difficulty to the

courts, but also to the Legislature since its first enactment in 1801. The original act will be found in Littell's Laws of Kentucky, Vol. II, Ch. 375, p. 467. This act was passed in December, 1801, entitled "An act to amend the penal laws of this Commonwealth." The first act to amend the penal laws of the Commonwealth was passed February, 1798, and will be found in Littell's Laws, Vol. II, p. 10. In that act, the Legislature divided murder into first and second degrees; provided punishment for murder in the second degree; provided punishment for voluntary manslaughter by that name; made provision for involuntary manslaughter; provided that "every person convicted of murder of the first degree, his or her aiders, abettors and counsellors shall suffer death by hanging by the neck"; and provided that "every other felony, misdemeanor, or offense, whatsoever, not provided for in this act may and shall be punished as heretofore."

The act of 1801 Sec. 1, provides that all murder consisting in any kind of wilful, deliberate and premeditated killing or perpetrated in the commission of or attempt to commit arson, rape, robbery, burglary, shall be felony; and every other kind of killing committed with malice aforethought, either express or implied, shall be felony and punished with death. And in the same Sec. 1, without even a division into a new paragraph, in the same breath with the preceding, follows; "Every person or persons who shall strike, stab, thrust or shoot any person or persons, the party which shall so strike, stab, thrust or shoot, so that the person stricken, stabbed, thrust or shot shall die thereby within six months next following, although the same be done without malice aforethought, yet shall the party so offending and being legally thereof convicted undergo a confinement in the jail and penitentiary house, for a period not less than six months nor more than six years; Provided always that this act or any thing therein contained shall not extend to any person or persons who shall kill another in self-defense, or by misfortune or accident; nor shall extend to any other person or persons who, in keping or preserving the peace, shall chance to commit manslaughter, so as the said manslaughter be not committed wittingly, wilfully, and of purpose, under pretext and color of keeping the peace."

The same act, Sec. 40, expressly repealed the Sections of the act of 1798 which provided that no crime but murder in the first degree should be punished with death; that murder be divided into two degrees; that murder of the second degree should be punished in that name; that murder in the first degree be punished in that name; and that "every other felony, misdemeanor or offense, whatsoever, not provided for in this act may and shall be punished as heretofore."

That this act of 1801 immediately raised serious questions and caused uncertainty we find from an act of 1802, which, Sec. 17, (Morehead and Brown p. 1281) provides as follows: "And whereas doubts have been entertained whether such killing as may happen in the perpetration or attempt to perpetrate any unlawful act, be murder, within the meaning of the act to amend the penal laws, passed at the last session of the General Assembly, unless it be in the case of arson, rape, robbery or burglary; be it enacted, that the said act shall not be so construed as any way to alter or change the idea of murder as it stands at common law." This, it is submitted, is, in effect, a declaration that the statute of 1801 did not lay down definition of crime, but only classified murder as defined at common law into groups for the purpose of grading punishment; and, specifically as to Sec.

1151, that it was not intended to define a new crime.

And the same act (Morehead and Brown, p. 1282) repeals, by express provision, "all laws and statutes which provide for punishment of offenses for which other punishments are provided by act of Assembly * * *," which restricts punishment in cases where there is a punishment prescribed both at common law or under a Virginia or English statute and by act of General Assembly of Kentucky to the latter.

The exact state of the law still remained a matter of controversy for nearly twenty-five years, when the Legislature undertook again to set the judges right. In 1825, the Legislature (Morehead and Brown, p. 1285) enacted: "Whereas it hath been represented that it has been decided by some of the judges of the State, that so much of the act of the General Assembly passed on the tenth day of February, 1798, as provides for the punishment of voluntary manslaughter, is repealed by the first section of an act passed on Decmber 19th, 1801: Be it enacted,

Sec. 1. Punishment of two to ten years for voluntary manslaughter.

Sec. 2. "If any person, with intent to stab, thrust or shoot, shall stab, thrust, or shoot any person, so that the person stabbed, thrust or shot shall die thereof within six months next following, although the same be done without malice aforethought, the party offending, being convicted thereof, shall undergo a confinement in the jail and penitentiary house for a period not less than six months nor more than six years: Provided always, that anything in this act contained shall not extend to any person who shall kill another in self-defense, nor extend to any other who shall kill another by chance, in keeping or preserving the peace, so as the said manslaughter be not committed willingly and under color of keeping the peace."

In the same act, the first section of the act of 1801 was repealed.

That this act added to the confusion, is set out in the act of 1827 (Morehead and Brown, p. 1295): "Whereas it is represented to the General Assembly that doubts exist, whether the punishment of the crime of wilful murder has not been taken away by an Act of the General Assembly, entitled An Act to amend and explain the penal laws passed the twelfth day of January, 1825, Be it enacted: That nothing in the before recited act, or any other act, shall be construed to alter or change the definition and punishment of wilful murder by the common law * * *."

'It will be noticed that through the controversy which caused this enactment the distinction between "wilful" murder and murder not "wilful" was brought to the attention of the Legislature, and that it expressly recognizes "wilful" murder as a species of murder. It is submitted that as all murder is wilful, the interpretation to be put upon the word "wilful" is that it confines the crime of murder so limited to cases where the death was in pursuance of a formed design to cause death or serious bodily harm, that is, wilful, deliberate and premeditated, a situation which is to be contrasted with the case where the design to cause death or harm is imputed from circumstances. In accordance with this view, we find in the Revised Statutes by Wickliffe, Turner and Nicholas, approved and adopted by the General Assembly in 1851 and 1852, and in effect from July, 1852:

Art. III, Sec. 4: If any person be guilty of wilful murder, he shall be punished with death.

Art. IV, Sec. 1: Punishment for voluntary manslaughter by that name.

Sec. 2: Identical with Carroll's Statutes, Sec. 1151, except that the last sentence of the latter does not appear in the former.

And we find in the General Statutes of 1873, p. 322:

Art. III, Sec. 3: Wilful murder punished by death or confinement for life.

Art. IV, Sec. 2: The last sentence of Carroll's Statutes Sec. 1151 appears.

From which review of the Statutes it will fairly appear:—

1. That the Legislature has never undertaken to disturb the common law definitions of the crimes of murder, voluntary or involuntary manslaughter.

2. That the Legislature has never undertaken to erect any fourth offense out of or outside of the three offenses of homicide recognized and defined at Common Law; specifically, that Sec. 1151 does not constitute a new offense, but only a group of instances of other offenses for the purpose of prescribing a common punishment.

3. That the Legislature has recognized the distinction between murder, wilful, deliberate and premeditated and murder not wilful, deliberate and premeditated.

4. That the former is punished under the statute; the latter under the Common Law except in those cases in which punishment is provided by some statute.

5. That the last sentence of Sec. 1151 is unintelligible and without application, since the Statute does not change the law of malice in respect to any offense.

6. That Sec. 1151 is applicable only to those cases of homicide which are graded or differentiated according to the absence or presence of a design to kill; therefore, not to involuntary manslaughter.

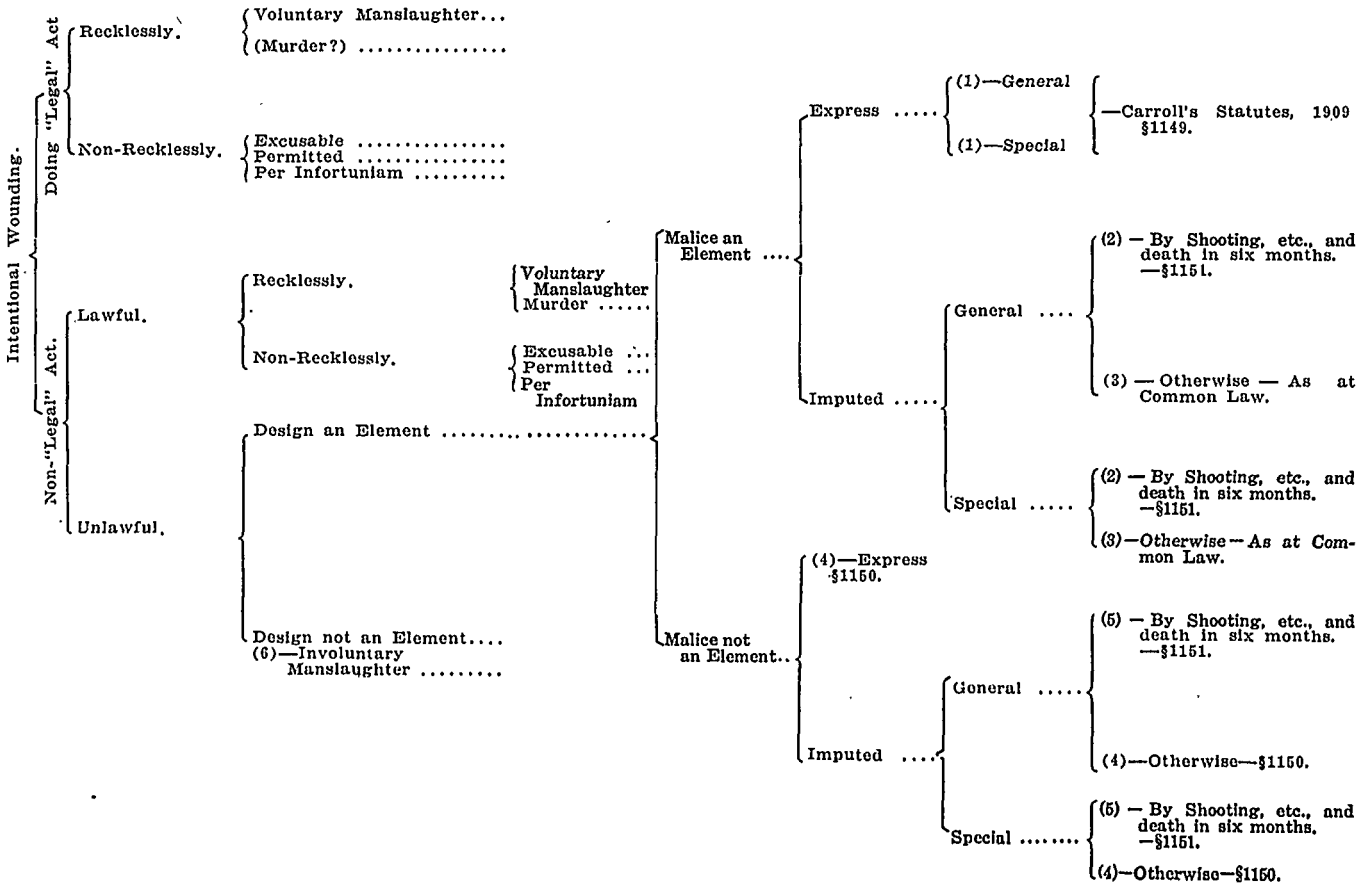
7. That Sec. 1151 is intended to prescribe a punishment in certain applications of the law of murder and voluntary manslaughter.

The foregoing positions and conclusions and their applications will be more apparent from the accompanying diagram, which is submitted, with great reserve, to the criticism of the bench and bar of Kentucky.

The import of the Statute conveyed in the language of the layman, is that, where one indicted for either murder or voluntary manslaughter pleads that he is blameless of the death of deceased because he did not "intend" to kill deceased, yet, although the jury believe that he had no formed design to kill deceased, if the act be done by means of any deadly instrument by which striking, stabbing, thrusting, shooting may be accomplished (from which intent may be imputed), he is nevertheless to be convicted, if death occur within six months, as for either murder or voluntary manslaughter according to the circumstances of the case, and in either case, to be punished by confinement in the penitentiary for a period of one to six years; and this is a positive injunction of the statute as to which the jury have no discretion, whatever may be the other circumstances; that is, they are forbidden to convict him of involuntary manslaughter or to acquit him.

—LYMAN CHALKLEY.

DEGREES OF HOMICIDE IN KENTUCKY.—DIAGRAM.



NOTES TO DIAGRAM.

(1). Murder at Common Law, but now punished in Kentucky under Statute Section 1149.

(2). Murder at Common Law, but now punished in Kentucky under Statute Section 1151.

(3). Murder at Common Law, and not provided for by Statute.

(4). Voluntary Manslaughter at Common Law, but now punished in Kentucky under Statute Section 1150.

(5). Voluntary Manslaughter at Common Law, but now punished in Kentucky under Statute Section 1151.

(6). Involuntary Manslaughter punished as at Common Law (?); more probably according to Section 12 of the Statute of 1798, which has never been repealed and is as follows:—

"Wheresoever any person shall be charged with involuntary manslaughter, happening in consequence of an unlawful act, it shall and may be lawful for the Attorney-General, or any other person prosecuting the pleas of the Commonwealth, with the leave of the court, to waive the felony, and to proceed against and charge such person with a misdemeanor, and to give in evidence any act or acts of manslaughter, and such person or persons, on conviction, shall be fined or imprisoned as in cases of misdemeanor; or the said Attorney-General, or other person prosecuting the pleas of the Commonwealth, may charge both offenses in the same indictment, in which case the jury may acquit the party of one, and find him or her guilty of the other charge."